

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)

**Petition for Declaratory Ruling and
Rulemaking Regarding IP-Enabled Dial-
around Calls from Payphones**)

) WC Docket 05-176
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**REPLY OF THE
AMERICAN PUBLIC COMMUNICATIONS COUNCIL**

The American Public Communications Council ("APCC") hereby replies to the comments filed with respect to APCC's March 23, 2005 Petition for Declaratory Ruling and Rulemaking Regarding IP-Enabled Dial-around Calls from Payphones ("Petition").

In the declaratory ruling component of its Petition, APCC asks the Commission to (1) affirm its prior rulings and make explicit that PSTN-originated dial-around calls from payphones are subject to the Commission's existing dial-around compensation rules, regardless of whether there is an IP-enabled service provider in the transmission path; and (2) make clear that IP-enabled service providers must comply with the compensation rules to the same extent as any other entity in the transmission path. APCC also asks the Commission to immediately begin a rulemaking to amend the compensation rule to make clear that, for IP-originated calls from payphones, IP-enabled providers must comply with the compensation rules to the same extent as any other entity in the call path.

The Petition was accompanied by a Motion to Consolidate and Expedite ("Motion"), in which APCC asked the Commission to (1) consolidate the Petition with the ongoing IP-Enabled

services rulemaking in WC Docket 04-36 (“*IP-Enabled Services Proceeding*”) and (2) give expedited treatment to the Petition.

I. DISCUSSION

A. The Comments Support APCC’s Request for Declaratory Ruling

The comments reflect support for the core component of the Petition—the request for a declaratory ruling clarifying that the existing dial-around compensation rules apply to IP-enabled providers in the call path of PSTN-originated payphone calls. Of the four commenters, two—the RBOC Payphone Coalition (“RBOC Coalition”) and Sprint Corporation (“Sprint”)—explicitly support the outcome requested by APCC in its declaratory ruling request, and one, Qwest, is silent.¹ Only iBasis, Inc. (“iBasis”), an IP-enabled provider that is itself already paying compensation, opposes the request.

1. RBOC Coalition

The RBOC Coalition wholly endorses both the relief requested by APCC’s declaratory ruling request and the underlying reasoning.² See RBOC Coalition Comments at 1. In the Petition, APCC pointed out that Section 276 very broadly requires fair compensation for each and every “call” from a payphone in order to ensure the statutory objective of widespread deployment of payphones. See Petition at 8-10. Accordingly, as APCC demonstrated, the

¹ While Qwest purports to object to APCC’s request for declaratory ruling, it is clear from Qwest’s comments that it is actually objecting to the petition for rulemaking component of the Petition. See Qwest Comments at 1. Accordingly, Qwest’s comments are discussed in Section II below, where APCC addresses the comments as they relate to the request for rulemaking.

² The RBOC Coalition also makes the additional point that any determination regarding the status of the IP-enabled calls that the Commission makes in response to the Petition should be “strictly limited to assignment of responsibility for payphone compensation.” RBOC Coalition Comments at 4. APCC would not object to such a limitation, provided that the limitation in no way created any ambiguity regarding the compensation obligations of IP-enabled providers.

Commission both can and must interpret its existing rules to include PSTN-originated calls that happen to include an IP-enabled provider in the call path. The RBOC Coalition closely echoes this view, pointing out that “the concern of Congress [in Section 276] was to ensure that PSPs would be fairly compensated for the use of their payphones.” RBOC Coalition Comments at 2. Therefore, “it is reasonable to give the term ‘call’ its ordinary meaning — that is, any communication initiated by a caller from a payphone attached to the PSTN.” *Id.*

The RBOC Coalition also agrees with APCC that, for PSTN-originated dial-around calls that also terminate on the PSTN, the Commission has already effectively resolved the issue of the applicability of its dial-around compensation rules in its order resolving AT&T’s petition for declaratory ruling regarding the applicability of access charges to phone-to-phone IP-enabled services. *See Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, Order, 19 FCC Rcd 7457 (2004). The RBOC Coalition agrees that since, in that ruling, the Commission determined so-called “IP-in-the-middle” calls are a telecommunications service, it “should therefore be uncontroversial that any entity delivering such a call . . . is a ‘long distance carrier or switch-based long-distance reseller’ for purposes of the payphone compensation rule.” RBOC Coalition Comments at 3.

The RBOC Coalition also agrees with APCC’s reasoning with respect to dial-around calls that originate on the PSTN, but are terminated in IP. In the Petition, APCC demonstrated that most, if not all, IP-enabled service providers are indisputably “Completing Carriers” with clearcut compensation obligations under the plain meaning of the compensation rule. The RBOC Coalition agrees, echoing APCC’s view that “[f]rom the perspective of the PSP (and the caller), a call is a call is a call — the functionality provided by the PSP is identical in all cases, and the compensation should be as well.” RBOC Coalition Comments at 3. The RBOC Coalition also agrees that, to the extent that the compensation rule is ambiguous, it should be

interpreted to encompass IP-enabled service providers that complete calls in order to prevent frustration of the purposes of the rule. *See* RBOC Coalition Comments at 3-4.

2. Sprint

Sprint also agrees that PSTN-originated calls are subject to the existing dial-around compensation rules. According to Sprint, the Commission should confirm that “VoIP providers are ‘carriers’ subject to the same rules as traditional telecommunications service providers, including payphone call tracking, reporting, and compensation — both in PSTN-to-PSTN and PSTN-to-IP calling.” Sprint Comments at 2. Sprint further agrees that action by the Commission is necessary because Sprint “shares APCC’s concern that some telecommunications service providers may be failing to comply with the payphone rules.” Sprint Comments at 8. As Sprint says, “[a]lthough non-payment by VoIP providers may not yet be large, certainly the size of the problem will be growing rapidly with the increase in VoIP calling.” Sprint Comments at 8.

However, while Spring supports the result advocated by APCC,³ Sprint urges the Commission to address the request in its *IP-Enabled Services Proceeding*, rather than acting independently on the Petition’s request for declaratory ruling. According to Sprint, “[w]ith a comprehensive order issued in the IP-Enabled Proceeding confirming VoIP providers are subject

³ The one substantive area with respect to which Sprint and APCC disagree is whether, if the Commission finds that the compensation rule does not require an IP-enabled service provider to pay for dial-around calls it completes, then the compensation obligation necessarily falls on the carrier that delivers a call to an IP-enabled service provider. As explained in the Petition, APCC believes that this outcome is required by Section 276 and the language and intent of the Commission’s rules. *See* Petition at 26-27. Sprint, however, contends that Intermediate Carriers cannot be held responsible for the calls it delivers to an IP-enabled service provider. According to Sprint, the PSP, and not the carrier, should “bear the consequences of any determination that VoIP providers are not subject to the payphone compensation rules.” Sprint Comments at 12. What Sprint ignores, however, is that Section 276 creates a statutory right to compensation for PSPs. While the Commission can decide which entity or entities in the call path bear responsibility for fulfilling that statutory mandate, the Commission cannot ignore it..

to Title II, it should be unnecessary to amend the Commission's payphone compensation rules, as requested by APCC, to 'clarify' that VoIP providers are subject to their provisions as 'carriers.'" Sprint Comments at 3.

Sprint is motivated by its concern that the Commission should not delay resolution of the larger issues surrounding IP-enabled services by focusing its attention on the Petition's declaratory ruling request. While APCC agrees that there are important issues affecting IP-enabled services generally that must be resolved, it does not follow that the Commission should not act expeditiously and independently on the Petition. As Sprint itself points out, nonpayment of dial-around compensation by IP-enabled service providers will be a growing problem. By quickly issuing a targeted declaratory ruling, the Commission can act to eliminate that problem before it worsens.

The timing of relief matters. Many PSPs, who depend on dial-around compensation for survival, are already struggling. If they begin to lose even a relatively small percentage of their dial-around compensation revenue, the results could be dramatic. The Commission should act now, before PSPs begin to suffer and exit the market, rather than later.

Moreover, while Sprint seems sure that the Commission will rule in the *IP-Enabled Services Proceeding* that IP-enabled providers are carriers in all respects, it is possible that the Commission will reach a different result. As APCC demonstrated in the Petition, the Commission, however, can find that IP-enabled providers are subject to the dial-around compensation rules regardless of how they are otherwise classified. Thus, the Commission can and should grant the requested declaratory ruling independently out of the outcome of its rulemaking proceeding.

Therefore, while the Commission should, as APCC requested in the Motion, consolidate the Petition into the rulemaking proceeding in order to ensure consistent treatment, the

Commission should not, as Sprint urges, await resolution of the rulemaking before acting on the declaratory ruling.

One other aspect of Sprint's comments requires a response. In the Petition, APCC showed why, if the Commission finds that the compensation rule does not require an IP-enabled service provider to pay for dial-around calls it completes, then the compensation obligation necessarily falls on the carrier that delivers the call to the IP-enabled service provider. As explained in the Petition, APCC believes that this outcome is required by Section 276 and the language and intent of the Commission's rules. *See* Petition at 26-27. Sprint, however, contends that a carrier cannot be held responsible for the calls it delivers to an IP-enabled service provider. According to Sprint, the PSP, and not the carrier, should "bear the consequences of any determination that VoIP providers are not subject to the payphone compensation rules." Sprint Comments at 12. What Sprint ignores, however, is that Section 276 creates a statutory right to compensation for PSPs. While the Commission can decide which entity or entities in the call path bear responsibility for fulfilling that statutory mandate, the Commission cannot ignore it. If the IP-enabled provider does not pay compensation, then the carrier must.

As for Sprint's contention that the Commission could not interpret its rules to impose the payment obligation on the carrier that delivers a call to an IP-enabled provider for completion without conducting a notice and comment rulemaking, Sprint misses the point. If VoIP providers are held to be information service providers, then, as the Commission has long held, they are end users. Under that scenario, the carrier in the call path that delivers the call to the VoIP provider is not, as Sprint suggests, the Intermediate Carrier, but rather is the Completing Carrier. Since under the Commission's existing rules, the Completing Carrier is already liable for paying compensation, no revision to the rule would be necessary.

In any case, Sprint's concerns about notice are empty puffery. Sprint can hardly claim a notice issue when it has filed comments responding to the point. In any case, to the extent that the Commission believes it is necessary, the Commission can issue a supplemental notice in its *IP-Enabled Services Proceeding*. Given the numerous issues left to be resolved and the proceeding's apparent timing, issuing such a supplemental notice would be unlikely to, as Sprint worries, delay the resolution of that proceeding. Indeed, it is very likely that the Commission will issue supplemental notices with respect to other issues in the proceeding and could very easily include the issue of carrier compensation responsibility when a call is delivered to an IP-enabled provider.

3. iBasis

The only commenter to oppose the declaratory ruling is iBasis. Neither of the arguments that iBasis advances, however, are persuasive. First, iBasis points out that it is voluntarily paying compensation. According to iBasis, "[n]otwithstanding that iBasis is not properly considered a 'Completing Carrier' as presently defined by the Commission, it is effectively operating as if the payphone compensation rules could apply to its business." iBasis Comments at 4. Thus, iBasis has established a tracking system, filed a system audit, and is paying compensation to PSPs. *Id.*

"Voluntary" compliance by iBasis, while appreciated by APCC,⁴ does nothing to ensure compliance by other IP-enabled providers, and is inconsistent with APCC's view that the existing rules *mandate* compliance. Unless the Commission acts to clarify that the rules apply to

⁴ With respect to its "voluntary" compliance, iBasis says that "APCC's Petition confirms the old adage that no good deed goes unpunished." APCC, however, applauds iBasis for taking the approach that it has and for its openness in describing its various service configurations in its system audit documents. Contrary to iBasis' view, APCC is not seeking to punish iBasis for setting the positive example it has. Indeed, the result that APCC is seeking would reward iBasis for having taken the high road it has by making clear that all of its competitors must do the same.

all IP-enabled providers in the call path of a PSTN-originated payphone, the expectation has to be that many IP-enabled providers may not take the high road and “opt” to comply as iBasis has done. Moreover, so long as compliance with the tracking and payment obligations is “voluntary,” PSPs have no recourse against providers who opt not to comply, or who pay less than what they owe. Such a result is clearly untenable. PSPs have a statutory right to be compensated for the use of their payphones. In order for that right to be meaningful, it must be enforceable.

The second argument iBasis advances against the Petition’s declaratory ruling request is its concern that the Commission “should not impose yet another layer of regulation on Internet-based providers.” iBasis Comments at 1. This concern is over-wrought. The Commission is not in danger of stifling the development of IP-enabled services by requiring IP-enabled providers to comply with the same rules that apply to all other service providers in the call path of a PSTN-originated payphone call. Indeed, if IP-enabled providers were exempted from the rule, it would only serve to give them an unfair advantage in the market. Here, as with universal service and other regulatory charges, IP-enabled providers would only be asked to pay their fair share. They are no less the “economic beneficiary” of a payphone call than a traditional TDM-based provider and there is no reason why IP-enabled providers should not compensate PSPs to the same extent as other carriers.

B. The Commission Should Initiate the Rulemaking Requested by the Petition

In addition to granting the declaratory ruling requested by the Petition with respect to PSTN-originated payphone calls, the Commission should also initiate the requested rulemaking proceeding concerning IP-originated payphone calls. While the RBOC Coalition and Qwest

oppose the rulemaking on the grounds that it is premature,⁵ see RBOC Coalition Comments at 5, Qwest Comments at 1-2, the concern animating their objection is misplaced. As the RBOC Coalition puts it, given that there are currently no IP-enabled payphones, any analysis would be both speculative and thus not worth the expenditure of the Commission's resources. RBOC Coalition Comments at 5. What this ignores, however, is that the Commission is already grappling with the issue of how to treat IP-originated communications in the *IP-Enabled Services Proceeding*. While IP payphones may or may not be "just a hypothetical possibility," RBOC Coalition Comments at 5, IP-originated communications generally certainly are not. So long as the Commission is considering the proper treatment of IP-enabled communications generally, it should take the opportunity to consider dial-around compensation issues related to those communications. Indeed, it is only if the Commission does not do so, and is forced to initiate another proceeding in the future, that the Commission would be allocating resources inefficiently.

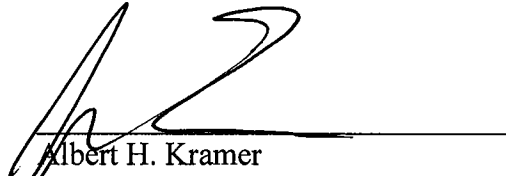
⁵ Sprint take no position with respect to the request for rulemaking. Sprint Comments at 17. For its part, iBasis does not distinguish between the declaratory ruling and rulemaking component of the Petition. APCC responds to iBasis' comments generally in Section I above.

II. CONCLUSION

For the reasons shown above and in the Petition, the Commission should grant the relief requested in the Petition.

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Respectfully submitted,



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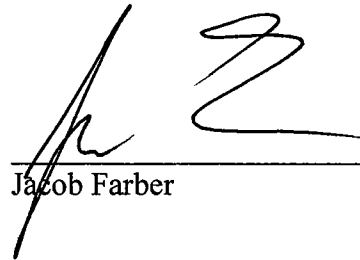
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